

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Omnipoint Corporation,)	
Complainant)	File No. PA 97-002
)	
v.)	
)	
PECO Energy Company,)	
Respondent)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: March 24, 2003

Released: March 25, 2003

By the Chief, Enforcement Bureau:

1. In this Order we grant in part a complaint that Omnipoint Corporation ("Omnipoint") filed against PECO Energy Company ("PECO"), pursuant to Section 224 of the Communications Act of 1934, as amended ("Pole Attachment Act")¹ and Subpart J of Part 1 of the Commission's rules.² Omnipoint's Complaint concerns access to PECO's facilities for the placement of Omnipoint's wireless Personal Communications Service ("PCS") base stations, antennas and equipment.³ Omnipoint requests that the Commission order PECO to comply with the Pole Attachment Act and the Commission's rules, provide Omnipoint with access to its facilities at just and reasonable rates, and provide Omnipoint with the information and documentation to support its attachment rate.⁴ We grant Omnipoint's Complaint in part and order PECO to comply with the Pole Attachment Act and the Commission's pole attachment rules, to the extent that Omnipoint continues to seek access to PECO's facilities.

2. Pursuant to the Pole Attachment Act, the Commission has general authority to

¹ 47 U.S.C. § 224.

² 47 C.F.R. §§ 1.1401-1.1418.

³ Complaint of Omnipoint Corporation, File No. PA 97-002 (filed April 1, 1997) ("Complaint") at 3.

⁴ Effective March 25, 2002, the Commission transferred responsibility for resolving pole attachment complaints from the former Cable Services Bureau to the Enforcement Bureau. *See Establishment of the Media Bureau, the Wireline Competition Bureau and the Consumer and Governmental Affairs Bureau, Reorganization of the International Bureau and Other Organizational Changes*, 17 FCC Rcd 4672 (2002).

regulate the rates, terms, and conditions for attachments by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility, except where such matters are regulated by a State.⁵ The Commission has adopted procedures to hear and resolve complaints concerning such rates, terms, and conditions,⁶ and has developed a formula methodology to determine maximum allowable pole attachment rates to ensure that such rates are just and reasonable.⁷

3. Omnipoint filed its Complaint pursuant to the Commission's pole attachment complaint rules. In its Complaint, Omnipoint requests the Commission to: a) admonish PECO that it is bound by section 224 of the Act and sections 1.1401 to 1.1416 of the Commission's rules; b) order PECO to provide information and supporting documentation required by section 1.1404(g) of the Commission's rules; c) require PECO to set a fair and reasonable pole attachment rate; d) order PECO to provide Omnipoint access to its poles, ducts, conduits, rights-of-way, and transmission towers on reasonable rates and terms; e) grant Omnipoint costs and attorneys fees; and f) grant such other relief as the Commission deems just, reasonable and proper.⁸

4. PECO responds to Omnipoint's Complaint with three jurisdictional and ripeness arguments, each of which we reject. First, we deny PECO's motion to dismiss the Complaint.⁹ PECO argues that we must dismiss the Complaint because Omnipoint is not actually attached to any of PECO's poles and the Complaint raises only hypothetical questions.¹⁰ We disagree and deny the motion. A complainant need not have gained access in order to file a valid complaint. A complaint alleging denial of access, in this case due to an allegedly excessive attachment rate, is valid and ripe for review under the Pole Attachment Act and the Commission's rules.¹¹

5. Second, PECO argues that the case is not ripe for review because Omnipoint did not

⁵ 47 U.S.C. § 224 (b) and (c). Pennsylvania has not certified that it regulates rates, terms and conditions of pole attachments. See *Public Notice, "States That Have Certified That They Regulate Pole Attachments,"* 7 FCC Rcd 1498 (1992).

⁶ 47 U.S.C. § 224 (b) (1).

⁷ See *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, First Report and Order, 68 F.C.C. 2d 1585 (1978); Second Report and Order, 72 F.C.C. 2d 59 (1979); Memorandum Opinion and Order, 77 F.C.C. 2d 187 (1980), *aff'd*, *Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985) (*per curiam*); and *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, 2 FCC Rcd 4387 (1987). See also, *Implementation of Section 703(e) of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 6777 (1998) and *Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd 6453 (2000), *pet. for recon. denied in part, Amendment of Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98; *Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103 (2001), *pet. for review denied sub nom. Southern Company Services, Inc. et al. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002).

⁸ Complaint at 6-7.

⁹ PECO's Motion to Dismiss, File No. PA 97-002 (filed September 18, 1998).

¹⁰ *Id.* at 2-5.

¹¹ See 47 USC § 224 (f) and 47 CFR § 1.1404 (m).

make PECO a counteroffer to PECO's proposed per site charge of \$2,100.00 and, therefore, did not attempt to engage in meaningful negotiations.¹² In order to conduct fruitful negotiations, an attaching party must have the information necessary to calculate a just and reasonable rate in accordance with the Pole Attachment Act.¹³ PECO failed to provide Omnipoint with the necessary information to support PECO's proposed \$2,100.00 rate. This failure provided an adequate basis for Omnipoint's filing the Complaint. We therefore disagree with PECO that the Commission's consideration of the limited request for relief in the Complaint is premature.

6. Finally, PECO argues that the Commission does not have jurisdiction in this matter because Omnipoint seeks to attach wireless equipment.¹⁴ We disagree. As the Supreme Court concluded last year in *NCTA v. Gulf Power Co.*,¹⁵ the Commission has jurisdiction over wireless telecommunications service attachments. This jurisdictional issue was the subject of extensive litigation elsewhere during the pendency of this case. The Supreme Court's recent resolution of this issue removes a final obstacle to resolving Omnipoint's limited request for relief.¹⁶

7. Having rejected PECO's principal defenses to Omnipoint's Complaint, we grant Omnipoint's request in large part.¹⁷ Specifically, we order PECO to comply with the Pole Attachment Act and the Commission's pole attachment rules. To the extent that Omnipoint continues to seek access to PECO's facilities, once Omnipoint identifies to PECO the sites it wishes to use and the type of equipment to be installed and requests access, PECO shall provide Omnipoint with historical cost data related to the specific facilities to which Omnipoint seeks attachment, in accordance with section 1.1404 of the Commission's rules.¹⁸ The parties shall then negotiate a just and reasonable attachment rate based upon the cost data supplied by

¹² Response of PECO Energy, File No. PA 97-002 (filed May 1, 1997) ("Response") at 5-6.

¹³ See 47 CFR § 1.1404 (j).

¹⁴ Response at 6-15.

¹⁵ 534 U.S. 327, 338-339 (2002).

¹⁶ We also deny American Electric Power Service Company, Commonwealth Edison Company, Duke Power Company, and Florida Power and Light Company's (collectively "utilities") motion to intervene in this proceeding. Motion of American Electric Power Service Company, Commonwealth Edison Company, Duke Power Company, and Florida Power and Light Company to Intervene, File No. PA 97-002 (filed June 18, 1997). The utilities allege only a general interest in the potential precedent involved in a complaint proceeding, which is not a sufficient basis for intervention. See, e.g., *Texas Cable and Telecommunications Association v. GTE Southwest Inc.*, 17 FCC Rcd 6261, 6265 (2002) ("... the mere precedential effect of the agency's rationale in later adjudications does not give rise to a legally cognizable injury and it does not create standing to intervene"). In any event, the utilities request intervention simply to argue that the Commission does not have jurisdiction under the Pole Attachment Act to regulate wireless attachments, an argument we have already rejected above.

¹⁷ PECO also argues that it is required under State law to provide all PCS attachers with nondiscriminatory rates, and because it offered Omnipoint the same rate that it charged all other PCS providers, the requirements of the Pole Attachment Act are satisfied. Response at 15-17. We disagree. The mere fact that PECO seeks to charge all PCS attachers the same rate does not satisfy the requirement of the Pole Attachment Act that the rate be just and reasonable.

¹⁸ We note that PECO argues that attachments to its transmission facilities are not covered by the Pole Attachment Act. We agree with PECO, but only to the extent that the transmission facilities are interstate and not part of a local distribution system. See *Southern Company v. FCC*, 293 F.3d 1338, 1345 (11th Cir. 2002).

PECO.¹⁹ In sum, PECO is obligated to provide Omnipoint access to its facilities at just and reasonable rates in accordance with the Pole Attachment Act and the Commission's rules.²⁰

8. Finally, we deny Omnipoint's request for attorney's fees and costs. The Commission has stated that it does not have the authority to award attorney's fees or costs in pole attachment complaint proceedings.²¹

9. Accordingly, IT IS ORDERED, pursuant to Sections 0.111 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.111 and §§ 1.1401-1.1418, that the relief requested in the Complaint IS GRANTED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED, pursuant to Sections 0.111 and 1.1401-1.1418 of the Commission's Rules, 47 C.F.R. §§ 0.111 and 1.1401-1.1418, that, to the extent that Omnipoint continues to seek access to PECO's facilities, Omnipoint and PECO SHALL NEGOTIATE IN GOOD FAITH maximum just and reasonable rates for pole attachments in accordance with 47 U.S.C. § 224 and the Commission's rules.

11. IT IS FURTHER ORDERED, pursuant to Sections 0.111 and 1.1401- 1.1418 of the Commission's rules, 47 C.F.R. §§ 0.111 and 1.1401- 1.1418, that Omnipoint's request for attorney's fees and costs is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹⁹ See 47 U.S.C. § 224 (d) (3) (e) (4); *Implementation of Section 703 (e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 at ¶ 102 (1998). We reject PECO's argument that it need not provide historical cost data. See *Alabama Cable Telecommunications Association, et al. v. Alabama Power Company*, 16 FCC Rcd 12209 at ¶¶ 32-61 (2001) (stating that the Commission's pole attachment formulas provide just compensation), *affirmed Alabama Power Company v. FCC*, 311 F.3d 1357 (11th Cir. 2002), *rehearing and rehearing en banc denied*, *Alabama Power Co. v. FCC*, --- F.3d ---- (11th Cir. Jan 08, 2003), *mandate stayed pending filing of petition for cert.*

²⁰ Thus, we do not decide in this order whether PECO's 1997 proposed rate is just and reasonable. First, Omnipoint's Complaint did not specifically request such a ruling. Second, we do not know whether PECO would seek to maintain such a rate today. We note, however, that the Commission has stated that the pole attachment formula presumptions may be modified or adjusted in order to address unique attachments associated with wireless systems. See *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 at ¶ 42 (1998).

²¹ See, e.g., *Multimedia Cablevision Inc. v. Southwestern Bell Tel. Co.*, Memorandum Opinion and Order, 11 FCC Rcd 11202 at ¶ 16 (1996).